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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FLOYD BACKES

Appeal 2009-010548
Application 10/780,840
Technology Center 2400

Before MARC S. HOFF, CARL W. WHITEHEAD, JR., and BRADLEY W. BAUMEISTER, *Administrative Patent Judges*.

WHITEHEAD, JR., *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Introduction

Appellant appeals under 35 U.S.C. § 134(a) from a final rejection of claim 1.[1] Appeal Brief 2, 5. We have jurisdiction under 35 U.S.C. § 6(b) (2002). We affirm.

Exemplary Claim

Exemplary independent claim 1 under appeal reads as follows:

1. Apparatus for use by an access point in a wireless communications environment wherein multiple channels are available for communication, comprising:

means for selecting a channel on which to provide service to at least one wireless device by:

sending at least one message indicative of a claim to the selected channel;

if no message indicative of a claim to the selected channel is received from another device, commencing operation on the selected channel; and

if a message indicative of a claim to the selected channel is received from another device, thereby indicating conflict, resolving the conflict by at least one of:

selecting a different channel on which to provide service, and

reducing transmission power; and

means for determining which wireless devices become associated with the access point by periodically:

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[1] There are two dependent claims, however, only the rejection of claim 1 is being appealed. Appeal Brief 2, 5.

sending a message to wireless devices to indicate presence and protocol capability of the access point;

receiving, from wireless devices, messages indicative of requests to become associated with the access point;

selecting a subset of the wireless devices from which a message was received indicative of a request to become associated with the access point, thereby rejecting some of the requests to become associated; and

sending a message to each selected wireless device to indicate that the access point will allow the selected device to communicate in the wireless communications environment via the access point.

Rejection on Appeal

Claim 1 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Publication 2003/0236064 A1 issued to Shiohara ("Shiohara") and U.S. Patent Publication 2003/0083095 A1 to Liang ("Liang"). Appeal Brief 5.

Appellant's Contention

Appellant contends that "[t]he cited references fail to describe either initial channel selection by APs [(Access Points)] or messages indicative of an intent to utilize a channel." Appeal Brief 6.

Issue on Appeal

Did the Examiner err in rejecting claim 1?

PRINCIPLE OF LAW

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of

obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). If the Examiner's burden is met, the burden then shifts to the Appellant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

ANALYSIS

We have reviewed the Examiner's rejections in light of the Appellant's arguments (Appeal Brief) that the Examiner has erred.

We disagree with the Appellant's conclusion. We concur with the conclusion reached by the Examiner.

The point of contention, according to the Appellant, is that "[t]he cited references fail to describe either initial channel selection by APs [(Access Points)] or messages indicative of an intent to utilize a channel." Appeal Brief 6. Appellant argues that his AP solicits input from other devices with the "Claim message" prior to beginning normal communications on a new channel. Appeal Brief 6; claim 1. Appellant further argues that the references cited in the obviousness rejection fail to describe either the initial channel selection by APs or the messages indicative of an intent to utilize a channel, but rather, both cited references describe techniques for responding to conflict that is already occurring once the devices are actually using the channel for active communications. Appeal Brief 6-7. Appellant then concludes that the cited references describe conflict counter measures, whereas the claimed invention describes conflict avoidance. Appeal Brief 7.

However, the Examiner points out that Shiohara's disclosure of a first wireless communications device (access point) that uses beacon signals correlates to the message indicative of a claim to a selected channel. Answer 8. The Examiner further explains that Shiohara discloses that the access point 10 first determines whether or not the wireless communication module receives a beacon signal transmitted from another device, and if there is no reception of a beacon signal, then the access point determines that there is no conflict of the channel and therefore uses the channel. Answer 8; Figures 2, 3. If there is a conflict because of the reception of a beacon signal, then the access point resolves the conflict. The Examiner correlates this to messages indicative of an intent to utilize a channel. Answer 8. Because we agree with the Examiner that Shiohara teaches a message indicative of a claim to a selected channel, we agree with the Examiner that the combination of Shiohara and Liang discloses the claimed invention and we will sustain the Examiner's rejection of claim 1.

CONCLUSION

The Examiner has not erred in rejecting claim 1as being unpatentable under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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